No. 08-56028

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE CITY OF SAN DIEGO, a municipal entity; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, an agency of the City of San Diego; KELLY BROUGHTON, in his capacity as Director of the Development Services Department of the City of San Diego; AFSANEH AHMADI, in her capacity as the Chief Building Official for the City of San Diego,

Appellants/Defendants,

v.

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware Corporation *dba* BLACKWATER WORLDWIDE,

Appellee/Plaintiff.

On Appeal from the United States District Court
for the Southern District of California

APPELLANTS' OPENING BRIEF

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INTRODUCTION

This appeal arises from the District Court's grant of a preliminary injunction in favor of Appellee BLACKWATER LODGE AND TRAINING CENTER *dba* BLACKWATER WORLDWIDE ("Blackwater"), Plaintiff below, against Appellants CITY OF SAN DIEGO, DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO ("DSD"), KELLY BROUGHTON ("Broughton" or "DSD Director") and AFSANEH AHMADI ("Ahmadi" or "Building Official") (collectively "the City"), Defendants below.

A Temporary Restraining Order ("TRO") and Preliminary Injunction, were erroneously granted directing the City to issue certificates of occupancy allowing Blackwater use of an industrial warehouse located at 7685 Siempre Viva Road ("Warehouse") in the City's planned Otay Mesa Development District ("OMDD") as a military training facility before the City, acting within its local land use regulatory authority, had the opportunity to review all of the permit applications in a consolidated manner and examine the proposed change of use of the warehouse as required by the San Diego Municipal Code ("SDMC" or "Municipal Code").

The City has indisputable land use regulatory authority over all proposed development within the City's jurisdiction. The City under its Municipal Code also has reasonable discretion to determine the type and level of land use review required to change the use of a warehouse in the OMDD industrial sub-district to a

potentially non-conforming use, such as the military training center for the Naval personnel envisioned by Blackwater.

Therefore, the City respectfully submits that the District Court erred by 1) impermissibly interfering with the City's land use authority; 2) characterizing the appropriate permits Blackwater obtained as simply "ministerial" ; 4) not permitting the City to follow its Municipal Code allowing the City to consolidate and study the piecemeal permit process Blackwater utilized to affect a change of use of the industrial warehouse; and 5) determining a local land use matter as "ripe" for adjudication under a federal due process claim when the process was not complete.

Key to the District Court's determination of the due process issue was its belief that, for procedural due process purposes, Blackwater possessed a property right to certificates of occupancy further allowing a change in the use of the Warehouse merely because Blackwater, through surrogates, applied for minor building permits that unduly delayed the City's awareness of the substantial changes in use being proposed by Blackwater. Once the building permits were reviewed in the aggregate under the totality of the circumstances, the City decided a higher level of review was needed as provided by its Municipal Code.

Specifically, when any applicant applies for more than one permit for a single development, the City has discretion to consolidate the applications processing and have them reviewed by a single decision maker, who is required to

act on them at the highest level of scrutiny for the proposed development. This review, however, was short-circuited by the Preliminary Injunction issued by the District Court.

Indeed, as Blackwater's overall development purpose became apparent, the City became concerned that review elements required by, for example, the California Environmental Quality Act ("CEQA") [California Public Resources Code §§ 21000 *et seq.*] might also become triggered. However, the City was prevented from fully exploring these issues. Thus, the change of use for the Warehouse from industrial storage to a military training use for the Navy, *was never*, and to date *has never been*, fully reviewed and approved by the City. The preliminary injunction issued by the District Court accordingly should be set aside as an abuse of discretion.

As it will be argued below, Blackwater failed to meet its burden to show a clear probability of success on the merits of its procedural due process claim – *i.e.*, that it would be deprived of a meaningful opportunity to be heard with respect to the proposed change of use of the Warehouse. Indeed, the City proposed, consistent with its regulatory scheme, to provide a series of hearings intended to allow Blackwater a full and complete opportunity to justify the change in use of the industrial Warehouse to a military training facility, as well as the opportunity for the public to be involved in the process. The City, as well as its ultimate

decision-maker, the City Council, also were wrongfully deprived the opportunity to consider Blackwater's military training project in its entirety and to decide if it complied with the City's OMDD planned development district and other regulatory requirements, such as CEQA.

Contrary to the District Court's ruling, however, Blackwater's has not been deprived of a vested property right in land use procedures. The City has only sought to follow the procedures provided for in its Municipal Code, which permits the City to consolidate Blackwater's multiple permits and to review those permits under the totality of the circumstances. Without a property right, Blackwater's procedural due process rights have not been violated and Blackwater's federal procedural due process claim necessarily fails.

Accordingly, the City respectfully requests that this Court reverse the District Court's grant of a preliminary injunction in favor of Blackwater, in order that the City may be allowed to undertake a meaningful deliberative process at the local governmental level, and to avoid premature adjudication of any issue before it is ripe for federal intervention.

JURISDICTIONAL STATEMENT

Blackwater filed its lawsuit pursuant to 42 U.S.C. § 1983 alleging federal constitutional violations, specifically to its procedural due process and equal protection rights, as well as pursuant to the dormant Commerce Clause, and

pendant state constitutional violations of its procedural due process and equal protection rights. Plaintiff alleges that the District Court has jurisdiction under 28 U.S.C. §§ 1331, 1332, and 1343.

The court entered the subject preliminary injunction on June 17, 2008,[1] which the City timely appealed on June 18, 2008, giving this Court jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Did the District court err by prematurely granting Blackwater's request for a Preliminary Injunction before the matter was ripe for adjudication by the District Court?

2. Did the District Court abuse its discretion by deciding an issue of local land use law before the local government agency had been provided the opportunity to complete its administrative process and achieve a final agency decision?

STATEMENT OF THE CASE

On May 23, 2008, Blackwater filed its complaint against the City for 1) Injunctive Relief; 2) Declaratory Judgment; 3) Violation of 42 U.S.C. § 1983 (Procedural Due Process); 4) Violation of 42 U.S.C. § 1983 (Equal Protection);

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[1] The only federal ground considered by the District Court was Blackwater's claim that the City's actions violated the former's procedural due process rights.

5) Dormant Commerce Clause; 6) Violation of California Constitution Art. I, §7(A) (Procedural Due Process); and 7) Violation of California Constitution Art. I §7(A) Equal Protection). [ER Vol. II, 218-278]. On May 27, 2008, Blackwater applied *ex parte* for a TRO contending Blackwater would suffer irreparable harm if it was not able to begin use of a warehouse located at 7685 Siempre Viva Road ("Warehouse") in the City's planned OMDD to train U.S. Navy personnel in "Security Reaction Forces" training. [ER Vol. II, 279-312]. Blackwater's application was granted on June 4. 2008. [ER Vol. I, 149-150, 151-162]. On June 17, 2008, the District Court granted a Preliminary Injunction enjoining the City from refusing to issue certificates of occupancy to Blackwater for those portions of the Warehouse the City had granted Blackwater building permits. [ER Vol. I, 130-131, 132-148]. The City was directed to promptly process any other pending permits for the Warehouse. [ER Vol. I, 126, 131, 148].

On June 18, 2008, the City filed the instant appeal of the District Court's order granting the Preliminary Injunction. [ER Vol. I, 1-25].

STATEMENT OF FACTS

On May 23, 2008, Blackwater filed its complaint against the City [ER Vol. II, 218-278]. Immediately thereafter, on May 27, 2008, Blackwater applied for a TRO contending Blackwater would suffer irreparable harm if it was not permitted immediate use of the Warehouse in the City's planned OMDD industrial park to

train U.S. Naval personnel in "Security Reaction Forces" training. [ER Vol. II, 179-312]. Security Reaction Forces Training includes training in the use of deadly force with 9-mm pistols, shotguns, and M16 rifles. This course is designated by the Navy as "HIGH RISK"—its primary focus is the combat of terrorist attacks. [ER Vol. II, 360]. Blackwater, however, asserted it was simply planning to operate a "vocational school" in the Warehouse.

On May 19, 2008, the City notified Blackwater it would not yet issue a certificate of occupancy for the Warehouse as a military training center until Blackwater properly applied to the City for a "change of use" of the Warehouse as required by the SDMC and the City's OMDD regulations [ER Vol. II, 265-270]. The City's DSD Director explained:

> As outlined in the attached opinion from the City Attorney's office, no certificate of occupancy will be issued until the appropriate discretionary processes associated with the use of firearms in city limits and determination of use for the vocational/trade school by the Planning Commission has been completed. Since Planning Commission and City's [sic] Council's actions will be considered discretionary, these actions are subject to review und the California Environmental Quality Act [CEQA].

[ER Vol. II, 265].

Prior to this time, the City had, in fact, granted a number of minor Warehouse alteration building permits, including installation of 44 feet of office partitions, air conditioning units, and exhaust fans requested by the owner of the

Warehouse and by agents appearing to act on behalf of the Warehouse owner and/or its lessee. [ER Vol. II, 332].

In February 2008, however, a new entity, "Raven Development Group," applied to add an "indoor firing range," to the Warehouse, making apparent for the first time that the Warehouse was going to be used as a military "training facility." [ER Vol. II, 316, 332, 347-356]. At the time Blackwater applied to add the firing range, Blackwater failed to disclose the majority of the square footage of the Warehouse (approximately 54,320 sq/ft of the 60,000 sq/ft Warehouse) would contain a training area and Navy replica ship bulkhead simulator ("Ship Simulator"). [ER Vol. II, 332, 363-375]. The permit for the Ship Simulator and use of the Warehouse as a military training facility has *still not been processed* by DSD.[2] It *had not been processed* by DSD at the time the District Court issued its TRO *nor when it issued the* Preliminary Injunction. [ER Vol. II, 332, 363-375].

At the hearing of Blackwater's request for a Preliminary Injunction, the District Court found Blackwater met the standards to obtain a grant of Preliminary Injunction. [ER Vol. I, 95, 140]. The Court determined a "series" of ministerial permits allowed Blackwater the use of the Warehouse. [ER Vol. I, 95, 141].

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[2] At present, despite Blackwater's pending permit to add a "simulator/ ride", which Blackwater conceded was a small area of the Warehouse, a permit to change the use of the majority of the square footage of the Warehouse (other than the firing range and office space) from warehouse to use as a military training facility has not been processed by the City. [ER Vol. II, 332].

Specifically, the District Court found that a "building permit" issued in September 2007 (to a non-apparent Blackwater-related entity), allowed minor alterations, and permitted the continued use of the Warehouse as a warehouse. [ER Vol. I, 96, 134]. The Court also found building permits were issued in October, 2007, for the installation of air-conditioning and exhaust fans. [ER Vol. I, 96, 134]. In February 2008, yet another building permit was requested by the owner of the Warehouse for installation of electrical work. [ER Vol. I, 96, 134]. All of these permits were issued and the work completed. However, not until February of 2008 was a building permit application filed by "Raven Development Group" for an indoor firing range. [ER Vol. I, 97, 134]. This was the first real indication the Warehouse would be changing use from an industrial warehouse to a military training facility. [ER Vol. I, 97, 134].

The District Court, however, mistakenly concluded that on April 29, 2008, the City's Building Inspector "found no unresolved issues." [ER Vol. I, 98, 134]. The Building Inspector's sworn testimony indicates otherwise:

> On or about April 29, 2008, I had a conversation with several people at the Development Services Department in question. To the best of my recollection, the people in attendance included at least one representative of Blackwater, two representative from the contractor, and, [sic] potentially Blackwater's attorney.....In this conversation of April 29, 2008, I stated to those people that to use the warehouse for training, the plans have to be reviewed per California Building Code and issued a separate permit as the building's current use allowed only for warehouse use.....I recall stating to these persons that a building permit is required to

> change the occupancy of the warehouse...because the plans for the project listed "training" as one of the uses for the facilities.

[ER Vol. II, 332].

In fact, following the Building Official's communication to Blackwater, the Court noted, but ignored as insubstantial, the fact that on May 19, 2008, the City's DSD Director informed Blackwater the change of use of the Warehouse to a military training facility needed further discretionary review and processing. [ER Vol. I, 99; Vol. II, 225, 265]. The District Court did correctly note that the City's DSD Director informed Blackwater it could use the Warehouse as a warehouse – but not yet as a military training facility. [ER Vol. I, 99, 135; Vol. II, 225].

On June 5, 2008, the day after the District Court granted the TRO, an audit report issued at the request of the City's Mayor ("Auditor's Report" [ER Vol. II, 376-416]) indicated that Blackwater did not intentionally misrepresent its identity when requesting a change of use of the Warehouse to a military training facility, even though Blackwater did not complete, sign or file any of the referenced building permit applications. [ER Vol. I, 100, 137; Vol. II. 384]. Instead, the District Court determined that the City was on "constructive notice" of Blackwater's intent to conduct military training somewhere within the City because in February 2008, Blackwater filed a Business Tax Certificate – albeit in a City department separate from DSD – stating its business purpose. [ER Vol. I, 103, 137]. No explanation was provided regarding how the City's DSD land use

planning staff would have had access to this information when processing minor structural alteration permits.

The District Court further accepted as true, based on the Auditor's Report, that the City's DSD staff had the power to classify Blackwater's proposed military training program as operating a "vocational school"—a permitted use within the OMDD—even though the applicable ordinances require any "vocational school" to be related to a use permitted in the OMDD industrial sub-district. [ER Vol. I, 103-104, 138]. Nowhere, however, was it explained that military training is an acceptable and permitted use within the City's OMDD. Nowhere in the Auditor's Report was there any analysis or discussion of the DSD Director's May 19, 2008 letter to Blackwater. [ER Vol. II, 265]. Rather, the District Court simply accepted the *post hoc* rationalization that a "military training facility" is akin to having security guards on business premises within the OMDD, which is an acceptable "business support use" within the industrial sub-district. [ER Vol. I, 105, 138].

In addition, the District Court also accepted as true, but dismissed, the Auditor's findings that the "complexity and lack of clarity of certain sections of the [City's] Municipal Code contributed to these differing interpretations." [ER Vol. I, 106; Vol. II. 389]. Finally, the fact that guns would be utilized in the Warehouse was dismissed as not within DSD's authority over zoning and building regulations. [ER Vol. I, 106, 139].

The District Court, therefore, found that Blackwater demonstrated a strong likelihood of success on the merits of its procedural due process claim. [ER Vol. I, 108, 121-122, 139]. Without addressing the DSD Director's clear indication that further land use review was mandated before the Warehouse could be used as a military training facility, the District Court determined the City had a mandatory duty to issue occupancy certificates for the Warehouse to Blackwater. [ER Vol. I, 112-116, 148].

The City respectfully submits the District Court abused its discretion when it prematurely ordered the City to issue such certificates of occupancy for use of the Warehouse as a military training facility. By the District Court's own admission, Blackwater was allowed to "[take] over the facility" without granting the City an opportunity to complete an appropriate local land use planning review. [ER Vol. I, 68]. The City respectfully submits such a finding constitutes reversible error.

SUMMARY OF THE ARGUMENTS

At the outset, this case is not ripe for judicial consideration as to any federal ground (or pendant state grounds) asserted by Blackwater because the City has been prevented from exercising its local regulatory land use authority. Since there has been no final regulatory decision by the City's governing body, Blackwater's asserted claims for relief are not ripe and should be dismissed or stayed pending further final action or decision-making by the City.

The District Court's preliminary injunction mandating that the City issue a certificate of occupancy to Blackwater further is an abuse of discretion and did not preserve the *status quo* as it existed at the time of the filing of Blackwater's complaint in this case. Blackwater also did not meet its burden of showing a clear probability of success of its claim that its procedural due process rights under the Federal Constitution were violated when the critical elements of such a claim—*including a clearly defined protectable interest under state law*—are absent. Because the District Court's decision is based on legal and factual errors relating to Blackwater's alleged property rights, the preliminary injunction is an abuse of discretion requiring reversal, or at a minimum, *vacatur* and remand.

ARGUMENTS

I. APPLICABLE STANDARDS OF REVIEW

This appeal presents a mixed standard of review as the City contends that Blackwater's action was not ripe for judicial review at the outset, and even if it was ripe, the preliminary injunction issued in this case was granted in error.

Ripeness is a question of law that this Court reviews *de novo*. *See, e.g.*, *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1131 (9th Cir. 1998); *Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002); *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1124 (9th Cir. 1996). A case is generally considered ripe if: (1) the relevant issues are sufficiently focused

to permit judicial resolution without further factual development, and (2) the parties would suffer a hardship by the postponement of judicial action. *Id. Also see, Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996).

In addition, a district court's decision to enter a preliminary injunction is reviewed for an abuse of discretion. *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1156 (9th Cir. 2006). *Also see, Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004). A district court "necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id.* (*quoting, Rucker v. Davis*, 237 F.3d 1113, 1118 (9th Cir. 2001)(*en banc*)). Also see, *Rodde v. Bonta*, 357 F.3d 988, 994 (9th Cir. 2004); *Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003) (district court abuses its discretion, even when it applies the correct law, if it rules in an irrational manner); *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994) (order granting a preliminary injunction is reversible for legal error if the court did not apply the correct preliminary injunction standard, or if the court misapprehended the law with respect to the underlying issues in litigation).

A district court's decision to enter a preliminary injunction must be supported by findings of fact, which are reviewed for clear error. *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1239 (9th Cir. 2001). When a district court is

alleged to have relied on an erroneous legal premise, this Court reviews the underlying issues of law *de novo*. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996). Where an injunction is issued against government officials, a district court will "be deemed to have committed an abuse of discretion ... if its injunction requires any more of state officers than demanded by federal constitutional or statutory law." *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995).

II. BLACKWATER'S COMPLAINT, AND THE INJUNCTIVE RELIEF OBTAINED, WAS NOT RIPE FOR JUDICIAL CONSIDERATION

Article III of the U.S. Constitution limits the jurisdiction of federal courts to actual cases or controversies. U.S. Const. art. III, §2. This constitutional provision therefore requires that the Court consider whether Blackwater's claims are ripe for judicial consideration. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). Ripeness is a doctrine of justiciability that concerns when review is appropriate. Ripeness is similar to standing – where standing is concerned with who is a proper party to litigate a particular civil action, ripeness is concerned with when a proper party may litigate that action.

In deciding the ripeness issue, the Court must consider (1) whether the issues are fit for judicial decision and (2) the hardship to the parties of withholding court consideration. *Abbott Laboratories, supra*, 387 U.S. at 149. *Also see, Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 284 (6th Cir.1997). Stated differently, agency action is fit for review if the issues presented are purely legal and the regulation at

issue is a final agency action. *Anchorage v. United States*, 980 F.2d 1320, 1323 (9th Cir.1992). Courts are to take a pragmatic and flexible view of finality, however. *See*, *Abbott Laboratories*, *supra*, 387 U.S. at 149-50.

The core question is whether the City has completed its decision-making process, and whether the result of that process is one that will directly affect the parties, as opposed to a possible or prospective event in the future. *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). The following elements also should be considered: whether the administrative action is a definitive statement of the agency's position; whether the action has a direct and immediate effect on the complaining parties; whether the action has the status of law; and whether the action requires immediate compliance with its terms. *See*, *Mt. Adams Veneer Co. v. United States*, 896 F.2d 339, 343 (9th Cir. 1989). *Also see*, *Anchorage*, *supra*, 980 F.2d at 1323.

As in this case, before a plaintiff may bring an as-applied challenge to a municipal ordinance, the agency must be given an opportunity to "arrive[ ] at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County v. Hamilton Bank*, 473 U.S. 172, 191 (1985)(takings case). *Also see, Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1033 (9th Cir. 2005)(under procedural due process claim, the ripeness doctrine's basic rationale is to prevent the courts, through

avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties, *quoting Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)); *Kinzli v. City of Santa Cruz,* 818 F.2d 1449, 1453-54, 1456 (1987) (along with just compensation and equal protection claims, no denial of procedural due process because plaintiff's substantive due process claim is not ripe).

When determining whether this action is one fit for judicial resolution at the pre-enforcement stage, the Court is also required to make "a determination of whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims." *Magaw, supra,* 132 F.3d at 284. In the absence of a factual record to demonstrate final agency action, particularly when an ordinance or regulation is being challenged on federal or state constitutional or statutory grounds, the Court is handicapped in determining whether the ordinance or regulation as applied *in fact* constitutes a federal constitutional or statutory violation. In short, a judicial determination would be premature and the underlying policy considerations the doctrine of ripeness seeks to address would go unresolved.

Furthermore, an action for damages under 42 United States Code §1983 is premature until the plaintiff has (1) obtained a final determination from the administrative agency charged with enforcing the regulation, and (2) exhausted its statutorily provided remedies. *Williamson, supra*, at 186-187, 194-197. While the policies underlying these two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Id.* at 193. *Also see, Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1041 (allegations of deprivation of due process and equal protection pursuant to title 42 U.S.C. §§ 1983 and 1988 not ripe because there was no final decision).

In this case, the District Court did not consider any arguments made by the City that it would be engaging in premature adjudication and that this case was not ripe for judicial consideration. This was plain error. At the time Blackwater filed its complaint, the City had declined to issue a certificate of occupancy in favor of a discretionary review process. At this stage, the City's administrative process was far from final and the District Court should have held that this precluded it from further consideration of the case.

Although the District Court only considered Blackwater's federal procedural due process claim, it also acknowledged that Blackwater's could obtain hearings at a multitude of levels, including as part of the offer of compromise by the City Attorney to allow Blackwater the ability continue to operate its training programs for naval personnel pending further discretionary reviews and hearings. [ER Vol. I, 121]. The District Court's acknowledgment clearly shows the error in not permitting the City's administrative reviews to be completed. This Court should correct this error and reverse the District Court's issuance of a preliminary injunction.

III. THE DISTRICT COURT'S PRELIMINARY INJUNCTION ORDER SHOULD BE REVERSED BECAUSE BLACKWATER HAS NOT SHOWN THAT IT IS LIKELY TO SUCCEED ON THE MERITS

The basic function of a preliminary injunction is to preserve the *status quo* pending a determination of the action on the merits. *Chalk v. U.S. Dist. Court*, 840 F.2d 701, 704 (9th Cir. 1988). The Preliminary Injunction Order does not preserve the *status quo* as the *status quo* existed prior to the time Blackwater initiated this litigation. The *status quo* at that time was a state in which Blackwater had been notified by the City that further discretionary review processes associated with the use of the building was need[ed]; and that "no other uses [would be] permitted until a submission for a request of change in occupancy [had] been made and approved by [DSD]." [ER Vol. II, 265].

To obtain injunctive relief, the moving party must establish: (1) the likelihood of its success on the merits; (2) a threat of irreparable injury; (3) that the balance of the hardships in its favor; and (4) that the requested injunction is not contrary to the public interest. *Raich v. Ashcroft*, 352 F.3d 1222, 1227 (9th Cir. 2003). Because these factors are interrelated, courts must consider them on a continuum: "the less certain that the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." *Southwest Voter Registration Ed. Project v. Shelly*, 334 F.3d 914, 918 (9th Cir. 2003).

Any injunction is an "extraordinary remedy" which does not issue as a matter of course. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982). Accordingly, the moving party must clearly show that it is entitled to injunctive relief. *See, e.g., Bernhardt v. Los Angeles County*, 339 F.3d 920, 932 (9th Cir. 2003) (the party seeking an injunction must carry its burden of persuasion by a "clear showing"); *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 881 (9th Cir. 2003) (to obtain a preliminary injunction, a party must make a clear showing) (emphasis added).

Furthermore, as in this instance, the District Court's duty when considering a mandatory preliminary injunction necessarily required that the moving party meet a higher evidentiary threshold. A prohibitory injunction merely preserves the

status quo. *Johnson v. Kay*, 860 F.2d 529, 541 (2d Cir. 1988). A mandatory injunction, on the other hand, goes well beyond simply maintaining the *status quo* and is particularly disfavored. *Stanley v. University of Southern California*, *supra*, 13 F.3d at 1320. *Also see*, *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979). When a mandatory preliminary injunction is requested, the district court should deny such relief "unless the facts and law clearly favor the moving party." *Id.* (Emphasis added) The District Court's finding of a strong likelihood that Blackwater would succeed on the merits of their claims must also evidence "a conclusion that the law and facts clearly favor plaintiff[], meeting the requirement for issuance of a mandatory preliminary injunction." *Katie A., ex rel. Ludin v. Los Angeles County*, 481 F.3d 1150, 1157 (9th Cir. 2007) (emphasis added).

Blackwater fail to make a clear showing of the likelihood of its success on the merits with adequate evidence to support its claims. Especially considering that the District Court was issuing a mandatory injunction, it also ignored certain facts that when considering the totality of the circumstances support the City's need to undertake a closer look at the proposed project. This would have the affect of providing Blackwater, as well as the public, with the procedural protections guaranteed by the federal Constitution, and specifically on the claim that Blackwater's procedural due process rights would be violated by a post-deprivation opportunity to be heard.

Consideration of the totality of the circumstances also discloses that Blackwater, contrary to the District Court's findings, did not acquire a vested property right that triggered procedural due process protections. Accordingly, Blackwater did not adequately demonstrate that it was likely to succeed on the merits.

A. Blackwater Did Not Establish a Probability of Success on the Merits Because it Cannot Prove A Vested Property Right

The District Court concluded that once building permits were issued, Blackwater became entitled to a certificate of occupancy. [ER Vol. I, 121, 145]. Such entitlement was viewed by the District Court to give rise to a protectable property right. Therefore, the City's unwillingness to issue the occupancy certificates led to the ultimate finding that Blackwater's procedural due process rights had been violated. As the District Court stated:

> Here, Plaintiff argues that state and local laws providing that Defendant shall issue the certificate of occupancy creates a protectable property interest because when a Government agency is given little discretion regarding whether to grant a permit, the denial of that permit creates a protectable right.

[ER Vol. I, 121-122].

The United States Supreme Court has repeatedly recognized that due process is a flexible concept. *See e.g., Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d 552, 561; *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The essence of procedural due

process is notice and an opportunity to respond. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). The United States Supreme Court also has held numerous times that where a governmental entity must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause. *See, e.g., United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993); *Zinermon v. Burch*, 494 U.S. 113, 128 (1990) (collecting cases); *Barry v. Barchi*, 443 U.S. 55, 64-65 (1979); *Dixon v. Love*, 431 U.S. 105, 115 (1977).

A threshold requirement to a procedural due process claim, however, is the plaintiff's showing of a liberty or property interest protected by the United States Constitution. *Wedges/Ledges of Cal. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (*citing, Board of Regents v. Roth*, 408 U.S. 564, 569 (1972)). To have a property interest, a person clearly must have more than an abstract need or desire. *Nunez v. City of L.A.*, 147 F.3d 867, 872 (9th Cir. 1998). A mere "unilateral expectation" of a benefit or privilege also is insufficient. *Id.* Instead, the plaintiff must have a legitimate claim of entitlement to the asserted property interest. *Id. Also see, Roth, supra*, 408 U.S. at 577; *Doran v. Houle*, 721 F.2d 1182, 1186 (9th Cir. 1983) (mere fact a person has received a government benefit in the past, even for a considerable length of time, does not, without more, rise to a legitimate claim of entitlement).

Protected property interests are not created by the Constitution, but by "existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005)(*citing*, *Roth*, 408 U.S. at 577). A reasonable expectation of entitlement is determined largely by the language of the statute and the extent to which such entitlement is couched in mandatory terms. *Wedges/ Ledges of Cal.*, *supra*, 24 F.3d at 62. *Also see*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005) (noting that property interests arise only when the relevant state law provisions truly make the conferral of the benefit mandatory). Based on the above, the court must: (1) identify the property interest that Blackwater the City deprived it of; (2) determine which specific law, ordinance, or other understanding the interest is created by and/or based; (3) determine whether California law recognizes the interest as a protected property interest; *i.e.*, whether the City has discretion to recognize or grant this property interest; and (4) if it is a property interest, under what legal circumstances may the City take away the interest (*i.e.*, what process is due).

Here, the District Court, in granting the preliminary injunction, never determined the appropriate process due, but instead only determined that a property interest in the permits and Certificate of Occupancy existed and the City had no right to take the interest away. As stated by the District Court:

> The City, through its own processes and procedures, set up a ministerial review. Plaintiff has complied with that ministerial review, and therefore is entitled to a certificate of occupancy. [¶] In that respect, Plaintiff's evidence shows that Plaintiff obtained the building permits and approval for the certificate of occupancy and that on April 30, 2008, the certificate of occupancy was approved and that Defendants have refused to -- absent the Court's TRO, refused to actually issue the certificate of occupancy.

[ER Vol. I, 123].

Although the existence of a property right is essential to a procedural due process claim, even if one were to be found, the District Court was still required to articulate the level of process that the City was obligated to provide. The District Court failed to do this.

1. *Blackwater Cannot and Did Not Acquire Vested Rights to Violate State and Local Law*

Blackwater does ***not*** have a vested right in the use proposed for its facility in Otay Mesa, particularly since an issued permit does not authorize the violation of federal, state or local laws. In California, the developer's right to complete a project as proposed does not vest until a valid building permit, or its functional equivalent, has been issued and the developer has performed substantial work and

incurred substantial liabilities in good faith reliance on the permit. *See, e.g., Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 321; *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 552. When Blackwater applies for any type of permit from the City, the latter reserves discretion as to the permit until all proceedings for its issuance are completed, including the certificate of occupancy. *Cf., Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 811 (9th Cir. 2007)(there are situations in which a municipality may deny, for reasons related to the impact of a commercial operation on the neighborhood, a permit for certain uses to operate commercially).

Moreover, even where a permit or approval is issued in error, the permit or approval is considered invalid *ab initio*, and the permittee therefore cannot reasonably and in good faith rely upon such a permit so as to obtain a vested right. *See Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n* (1976) 17 Cal. 3d 785, 791; *Davidson v. County of San Diego* (1996) 49 Cal.App.4th 639, 646 (vested rights requires showing that property owner has performed substantial work and incurred liabilities in good faith reliance on a permit). *Also see, Autopsy/Post Services, Inc. v. City of Los Angeles* (2005) 129 Cal.App.4th 521, 525 (city's grant of a building permit and owner's reliance on it did not create a fundamental vested right to use building for performing autopsies, where owner's permit applications never revealed the proposed use, and alleged oral approval by unidentified city

officials was insufficient); *Smith v. County of Santa Barbara* (1992) 7 Cal.App.4th 770, 773; *Fernhoff v. Tahoe Regional Planning Agency*, 599 F.Supp. 185, 188 (D. Nev. 1984); *California Tahoe Regional Planning Agency v. Jennings*, 594 F.2d 181, 189, 191 (9th Cir. 1979); *Russian Hill Improvement Ass'n v. Board of Permit Appeals* (1967) 66 Cal.2d 34, 56; *Pettit v. City of Fresno* (1973) 34 Cal.App.3d 813, 819; *Millbrae Ass'n for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 246; *Markey v. Danville Warehouse & Lumber, Inc.* (1953) 119 Cal.App.2d 1, 3-4. Accordingly, Blackwater must prove a property right in the use proposed for its facility and the "infringement" of that right by the City without adequate due process. *Buckley v. Cal. Coastal Comm'n* (1998) 68 Cal.App.4th 178, 192.

The issuance of a City permit does not, on its own, grant a party a vested property right. Rather, vested rights gained through reliance on a government permit are "no greater than those specifically granted by the permit itself." *Santa Monica Pines, Ltd. v. Rent Control Bd.* (1984) 35 Cal.3d 858, 866. ***Permits do not create vested rights to build structures that violate the laws applicable at the time the permit is issued.*** *See, e.g., Avco, supra*, 17 Cal.3d at 793 (neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a

building permit is issued); *Stubblefield Constr. Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 708 & n.11 (building permit merely constitutes an approval that a specific structure complies with the law in effect at permit issuance). Also, a property owner does not gain vested rights when the rules and practices adopted by the government do not conform to the requirements of state law. *See, e.g., People v. County of Kern* (1974) 39 Cal.App.3d 830, 842-43.

Furthermore, under the City's Municipal Code, the issuance of a permit "does not prevent the City Manager from subsequently requiring the correction of errors in the plans, specifications, and other data or the Building Official from stopping building operations that are in violation of the Land Development Code or ***any other applicable law***." SDMC § 121.0308(b) (emphasis added). Further, the Municipal Code expressly ***restricts*** the grant of authority in a building permit, providing that it "does not constitute a permit for, or an approval of, any violation of any of the provisions of the Land Development Code." SDMC § 121.0308(a) (emphasis added).

These Municipal Code provisions establish that, as a matter of law, no City building permit creates a vested right to build a structure that is "in violation of the Land Development Code" ***or*** "any other applicable law," which includes the requirements of CEQA and the City's discretionary review process.

Thus, the permits did not create any rights to violate applicable laws. To the contrary, the Municipal Code expressly warned Blackwater that the permits did not create the right to violate applicable law. Blackwater's subjective belief that the permits granted it vested rights to proceed does ***not*** create a vested right. *Consaul v. City of San Diego* (1992) 6 Cal.App.4th 1781, 1799 (subjective "belief is not enough to create a vested right which is otherwise unsupported by the land use regulations and the facts of the particular situation."). Any rights Blackwater might have obtained through the building permits do not, as a matter of law, include the right to violate CEQA or the City's discretionary review process.

A municipal government cannot authorize violations of state and local law through its permits. Cal. Const., Art. XI § 7. *Also see, Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (state laws yield to federal laws); *Hall v. City of Taft* (1956) 47 Cal. 2d 177, 184 (city ordinances yield to state laws). Blackwater is subject to all laws—federal, state and local—in effect at the time the building permit was issued. *See, e.g., Hazon-Iny Dev., Inc. v. City of Santa Monica* (1982) 128 Cal.App.3d 1, 10-11 (denying a claim of vested rights, affirming that a builder must comply with the laws in effect at the time a building permit is to be issued). *Also see, Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1224 (in considering applications for building permits, a city is obligated to examine permit applications on an individual basis, applying sound principles of

planning and zoning administration in a fair manner); *City of Rancho Palos Verdes v. Abrams* (2002) 101 Cal.App.4th 367, 375 (federal preemption of antennas does not prevent local government authorities from imposing permit requirement in a change in use).

Accordingly, contrary to the District Court's determination, Blackwater had not acquired a vested right and the City did not violate its procedural due process by taking action declining to issue a certificate of occupancy. The District Court's decision thus constitutes an abuse of discretion and this Court should reverse the issuance of the preliminary injunction.

2. *Under The Provisions of Both Local and State Law, Blackwater's Project Is Subject to CEQA*

Although recognizing that the building official has discretion with respect to issuance of building permits, the District Court appeared to be satisfied that the inquiry ended with respect to the issuance of building permits. As the District Court stated:

> The building official must be allowed great latitude, discretion in making this determination. The Court agrees in that respect. However, the difference in this case is that the evidence showed City officials have already made that determination, have granted the permits at issue consistent with its Municipal Code, and after conducting the final inspection, have approved the issuance of certificates of occupancy consistent with those permits. [¶] Once that occurs, pursuant to the City's own Municipal Code, there is little to no discretion regarding whether to issue certificates under Municipal Code 129.0114.

[ER Vol. I, 117, 118].

In California, building permits are presumed to be ministerial permits. *See, e.g.*, 14 California Code of Regulations ("CCR") § 15268(b)(1)("CEQA Guidelines" providing that ministerial projects are generally exempt from the requirements of CEQA).[3] However, in this case, once the City became aware of an overall project, the City's Mayor requested advice from the City Attorney's office. The City Attorney's office also identified discretionary elements that should be undertaken before issuance of the certificate of occupancy. [ER Vol. II, 399-403].

In practice, no "presumption" exists unless the City retains no discretion whatsoever in approving an application for a permit. Such an utter lack of discretion exists only where the City retains no discretion to exercise substantive judgment regarding the carrying out of any phase of the proposed project. *See Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 269-271. Standards are not "fixed" where they embody the earlier exercise of the City's discretion that can be changed or ignored at the City's discretion. *Id.* at 278. Therefore, issuance of a construction or building permit would be considered

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[3] CEQA Guidelines Section 15268(b)(1) provides that "[i]n the absence of any discretionary provision contained in the local ordinance or other law establishing the requirements for the permit, license, or other entitlement for use, the following actions shall be presumed to be ministerial: [¶] (1) Issuance of building permits."

"discretionary" when it requires application of judgment. The court in *Friends of Westwood* explained that the issuance of a building permit may be discretionary even where issuance is mandatory, as long as the approving agency retains discretion to require "substantial changes" in building design. *Id.* at 269. Such discretion may exist where the City can impose "reasonable conditions" based on "professional judgment." *Id.* at p. 272. (*citing, Natural Resources Defense Council Inc. v. Arcata National Corp.* (1976) 59 Cal.App.3d 959, 971).

Discretion may also exist where the standards guiding the City are "relatively general," rather than fixed and precise, and where the question of compliance involves "relatively personal decisions addressed to the sound judgment and enlightened choice of the administrator." *Id.* at 271-272 (*citing, People v. Department of Housing and Community Development* (1975) 45 Cal.App.3d 185, 193). Even the power merely "to delay a project" in order to explore alternatives may be enough to render the City's decision at least partly discretionary. *Id.* at 272-273 (*citing, San Diego Trust and Savings Bank, v. Friends of Gill* (1981) 121 Cal.App.3d 203, 210-214). *Also see, Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1138-41; *Day v. City of Glendale* (1975) 51 Cal.App.3d 817, 824.

For purposes of CEQA, the whole of the action is considered. The CEQA Guidelines define "project" to mean "the whole of an action" that may result in

either a direct or reasonably foreseeable indirect physical change in the environment. 14 CCR § 15378(a). In California, "project" is given a broad interpretation in order to maximize protection of the environment. *McQueen v. Board of Directors of the Mid-Peninsula Regional Open Space District* (1988) 202 Cal.App.3d 1136, 1143.

Thus, the City cannot piecemeal or segment a project by splitting it into two or more segments. The City must fully analyze each "project" in a single environmental review document, which ensures that environmental considerations do not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences. *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.

As explained in the DSD Director's letter, in consideration of the project as a whole (the totality of the military training operation envisioned by Blackwater), there is the potential for environmental impacts and there is a need for a discretionary level of review (as opposed to over-the-counter approval). [ER Vol. II, 265]. The totality of the project consists of a firing range, a ship simulator, the use of firearms at the site, and other military training operations which may have the potential for impacts to the environment, such as impacts to noise, security issues given the close proximity to the International Border and the Tijuana

International Airport, the potential for explosion or release of hazardous materials into the air, impacts to traffic which may require mitigation, discharges into the storm drain system, and other environmental considerations.[4]

Discretion was exercised by the City in determining the necessity of other approvals for Blackwater's project to proceed. *See* SDMC § 121.0101.[5] Thus,

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[4] The proximity of this facility to the International Border and two adjacent airports (such as Brown Field and Tijuana International Airport), create enough of a security issue (*e.g.*, terrorist target) to warrant CEQA analysis, consistent with the National Environmental Quality Act (NEPA). *See, San Luis Obispo Mothers For Peace v. Nuclear Regulatory Comm.*, 449 F.3d 1016, 1031-1033 (9th Cir. 2006). Such an analysis is also supported by or consistent with Department of Defense (DOD) Building Design Guidelines. In October 2003, the DOD issued Instruction Number 2000.16 "DOD Antiterrorism Standards," requiring all DOD Components to adopt and adhere to common criteria and minimum construction standards to mitigate antiterrorism vulnerabilities and terrorist threats. This affects the general practice of designing inhabited buildings including restrictions for onsite planning, standoff distances, building separation, unobstructed space, drive-up and drop-off areas, access roads, parking, structural design, structural isolation, and electrical and mechanical design. Given that this Blackwater operation will involve training of military personnel using weapons and other military gear, it would seem similar protections and standards would apply here as well.

[5] SDMC §121.0101 provides in pertinent part as follows: "The purpose of City review is to help ensure that *development* in the City of San Diego is protective of the public health, safety, and welfare. The intent of the Land Development Code is to provide different review processes appropriate to the different types of *development.* [¶] The Land Development Code provides procedures to review *land use plans*, zoning actions, maps, and permit applications. Map and permit reviews are divided into two major categories: development review and construction review. A proposed map or permit may require either type or both types of review as specified. Development review is the review of conceptual or schematic plans. Development review is required when conditions must be applied to a map or permit or when adjustments or exceptions from regulations are proposed." (Italics in original)

CEQA has been triggered and should apply to the whole of Blackwater's project, including but not limited to its use, occupancy and structural modifications at the Warehouse. The exercise of discretion or use of judgment in determining what reviews, approvals or conditions will attach to Blackwater's project is provided for in the San Diego Municipal Code.[6]

3. *Blackwater Cannot Have a Vested Right in a Process that is not Complete Where, in Exercising its Legal Discretion, the City Determines Additional Review of the Proposed Blackwater Project is Warranted*

It is well settled that the issuance of a building permit is ministerial if the applicant has met all legal requirements to obtain a permit. *See, Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85, 90-91; *Ellis v. City Council* (1963) 222 Cal.App.3d 490, 497. Whether the applicant has done so, however, is a discretionary decision for the City. *Thompson v. City of Lake Elsinore* (1993) 18 Cal.App.4th 49, 55-57 (holder of a building permit is not automatically entitled to a certificate of occupancy – meaning that a public agency has a mandatory duty to issue one) – merely because the project has been approved to the extent of obtaining a building permit); *Sutherland v. City of Fort Bragg*, 86 Cal.App.4th 13

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[6] *See, e.g.*, SDMC Sections 111.0205, 112.0101, 112.0102, 112.0103, 112.0501, 131.0620(e), 129.0111(d), 131.0110(a), 131.0110(c), 129.0101, 129.0104(a)(10), 1517.0201, 1517.0202, 1517.0301(c)(2), 128.0201, 128.0202(c), 128.0207 and 111.0205. These provisions are included in the Appellants' Appendix ("Appendix") filed and served concurrently herewith.

(2000) 19-23; *Inland Empire Health Plan v. Superior Court* (2003) 108 Cal.App.4th 588, 593; *Creason v. Department of Health Services*, 18 Cal.4th 623 (1998) 630-635. The City determined in its May 19, 2008 letter that Blackwater had not met all legal requirements to obtain a permit and Certificate of Occupancy because additional discretionary review and CEQA compliance were necessary.

It is within the City's municipal authority to require additional discretionary approvals before a project can proceed, as it did so in Blackwater's case. In the City of San Diego, the approval and issuance of a construction or building permit will not trigger a higher level of review (*e.g.*, public hearing) except where no other discretionary approvals are determined necessary. *See* SDMC §§ 111.0205 and 112.0502. In some instances, as explained above, the decision to allow a use or issue a construction or building permit may also result in the exercise of discretion or judgment which would trigger the application of CEQA. Such determination that additional reviews were necessary was made by the DSD Director, who exercised his discretion under SDMC § 111.0205,[7] 131.0110(a)[8] and

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[7] SDMC §111.0205 provides as follows: "(a) Authority. The City Manager may designate a staff member to make an impartial decision, without a public hearing, on a permit, map, or other matter in accordance with the decision-making procedures of the Land Development Code. [¶] (b) Appointment and Terms. The City Manager will determine whom to appoint and the length of time the staff member will serve as a decision maker. [¶] (c) Powers and Duties. Designated City staff will act as the decision maker to decide permits, maps, or other matters in accordance with the decision-making procedures of the Land Development Code."

1517.0301(c)(2),[9] and other provisions, to submit the project to further discretionary review, including CEQA review. [ER Vol. II, 265, 399-403].

As noted above, under SDMC §121.0308, the issuance of a construction or building permit does not grant a person a right to violate other laws. Pursuant to the Municipal Code, the City's Building Official is charged with making some interpretations of the applicable provisions of the City's Land Development Code. These interpretations are to be in conformance with the purpose and intent of the Municipal Code. *See* SDMC § 129.0104(a)(4). The Building Official is also charged with approving and issuing construction permits (*e.g.*, building permits, grading permits, *etc.*) that comply with the applicable Land Development Code provisions. *See* SDMC § 129.0104(a)(3).

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[8] SDMC §131.0110(a) provides that: "A use shall be identified as belonging to a use category and use subcategory based upon the descriptions in Section 131.0112 and the facility needs and operational characteristics of the use including type of use, intensity of use, and development characteristics of use. * * * If a particular use could meet the description of more than one use subcategory, the subcategory with the most direct relationship to the specific use shall apply. The City Manager shall identify a particular uses's category and subcategory upon request of an applicant or a property owner."

[9] SDMC §1517.0301(c)(2) provides as follows: "Other uses shall be permitted within the Commercial and Industrial Subdistricts as follows: * * * (2) Any other uses which the Planning Commission finds, in accordance with Process Four, to be similar in character to the uses enumerated in the Otay Mesa Development District Ordinance and which are clearly within the intent and purpose of the Otay Mesa Development District. The adopted resolution embodying any such finding shall be filed in the office of the City Clerk."

The Building Official is also charged with the duty to request and receive the assistance and cooperation of other City officials in carrying out these duties. *See* SDMC § 129.0104(a)(10). This includes seeking the assistance of the DSD Director and the City Attorney's Office. The Building Official performs her duties within the constructs of the Municipal Code, including the provision requiring discretionary permit approval before ministerial permit issuance.

> If a proposed *development* requires one or more *development permits*, the required *development permits* must be issued before an application is submitted for a *construction permit* except as provided in § 129.0105(c).

SDMC § 129.0105(b)(italics in original). A development permit is a discretionary permit requiring a public hearing and notice and opportunity to be heard. *See* SDMC § 113.0103.[10] A ministerial permit does not require a hearing to be issued. SDMC § 129.0108 states, "[a]fter all required approvals, including any required *development permits*, have been obtained and all required fees have been paid, the Building Official may issue a *construction permit*. Construction shall not begin until the required permits have been issued." (Italics in original)

The Building Official, pursuant to SDMC § 129.0111(d), upon inspection of the facility for which the permits were issued, shall either indicate that the inspected portion of the construction is satisfactory as completed or shall notify the

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[10] SDMC §113.0103 defines "development permit" as "a permit issued pursuant to Land Development Code Chapter 12, Article 6."

permittee or an agent of the permittee that the inspected portion fails to comply with the building, electrical, plumbing, or mechanical regulations or with other applicable regulations of the Municipal Code.[11] The Building Official, as stated in SDMC § 129.0111(d), may determine that the site does not comply with other applicable regulations of the Municipal Code. As clearly stated in the Municipal Code, the Building Official has the discretion to determine whether compliance with the Land Development Code has been satisfied:

> The Building Official shall inspect the *structure* and if the Building Official finds no violations of the Land Development Code or other regulations that are enforced by the City's designated Code Enforcement Officials, the Building Official shall issue a Certificate of Occupancy. All work for which a Building Permit was issued must be complete and have had a final inspection before issuance of a Certificate of Occupancy, except in accordance with § 129.0115. The Certificate of Occupancy must be signed by the Building Official.

SDMC § 129.0114 (italics in original).

A City determination that additional requirements of the Land Development Code apply to a project are fully within duties specified in law, as demonstrated above. In addition, it is fully within the scope and expectation of these assigned duties that the Building Official seek out assistance from other City officials where

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[11] SDMC § 129.0111 provides in pertinent part as follows: "All work for which a construction permit is issued shall be subject to inspection by the Building Official. Required inspections shall be performed in accordance with the inspection procedures established by the City Manager, except as may be exempted by the Land Development Code." The balance of this provision appears in the Appendix.

needed before issuing certificates of occupancy or before issuing permits. Such assistance was sought and obtained. In May 19, 2008, the City's DSD Director issued a letter informing Blackwater that additional discretionary review is necessary before the project could proceed. [ER Vol. II, 265]. This letter relied upon a legal analysis provided by the San Diego City Attorney, in which compliance with CEQA was analyzed and recommended. [ER Vol. II, 399-403].

Given the true scope of the project (*i.e.*, military training), the City's exercise of judgment is necessary to weigh and consider the facts. Thus, a discretionary level of review and decision as well as compliance with CEQA was determined necessary. For example, the definition of a vocational school is missing from the Municipal Code, thus triggering the exercise of discretion to determine whether Blackwater's proposed operation falls squarely within such definition. In addition, the definition of a firing range or shooting range is missing from the Municipal Code and will trigger the exercise of discretion or judgment to determine whether such a use fits within or is authorized within the zone.

Furthermore, the underlying zone allows for vocational schools but does not at all allow a firing or shooting range or a ship simulator and definitely does not provide for military security training operations of the kind and scope contemplated by Blackwater. Exercise of discretion is needed to determine if military activities can be allowed within the zone. The exercise of this discretion

requires compliance with CEQA. The Municipal Code allows for the City's exercise of discretion and judgment.

The fact that Blackwater would prefer that approvals for the uses it contemplated within the City's jurisdiction be issued over-the-counter (ministerially) without a public hearing is not a decision they are entitled to make, but one the City is fully capable of making within the confines of its local Municipal Code. Such a determination was made by the City's DSD Director. [ER Vol. II, 265]. Any arguments concerning whether the use is appropriate within the underlying zone can be raised by Blackwater to the decision-making body (*e.g.*, Hearing Officer, Planning Commission, and/or City Council) where appropriate due process is made available, with opportunity for Blackwater to appeal. If, after such hearings, Blackwater still disagrees with City findings, they have the same opportunity every applicant has to challenge the decision in state court by way of mandamus.

In addition, to the extent Blackwater disagreed with the City's DSD Director's determination, Blackwater had an opportunity to administratively challenge this determination as expressly provided for in SDMC § 131.0110(b), which provides in pertinent part as follows:

> If the applicant or property owner disputes the City Manager's determination, the City Manager may place the question of the appropriate use category and use subcategory for that particular use on the Planning Commission's agenda. The City Manager shall present

> the factors used in the determination and the position of the applicant or property owner. The Planning Commission shall recommend to the City Manager its interpretation of the appropriate use category or use subcategory for the particular use.

Instead of exercising its legal right to challenge the DSD Director's determination of use before the Planning Commission, Blackwater elected to prematurely seek this remedy in Federal Court. Thus, Blackwater cannot have a vested right in a process that is not complete where, in exercising its legal discretion, the City determines additional review of the proposed Blackwater project was and remains warranted.

4. ***Blackwater's Motion for Preliminary Injunction Fails Because the City Cannot Be Directed to Permit Violations of the Law***

Blackwater cannot establish success on the merits where Blackwater's violations of CEQA preclude such a result. In California, writ of mandamus cannot direct the government to permit a violation of law. *See, e.g., Duff v. City of Gardena* (1980) 108 Cal.App.3d 930, 936 (mandamus will not lie to compel the performance of any act which would be void, illegal, or contrary to public policy); *Swan v. Civil Serv. Comm'n* (1971) 16 Cal.App.3d 710, 713 (same). Likewise, this Court should not use its mandamus power to compel the City to permit what state law expressly prohibits, namely, Blackwater's violation of CEQA. *Id.*

CONCLUSION

The purpose of procedural due process protection is to provide notice and a meaningful opportunity to be heard. Blackwater artfully approached the development on a piecemeal basis to avoid the discretionary review the City should have been permitted to accomplish given the purposes of Blackwater's project. The District Court incorrectly determined that Blackwater had a property right. Without a property right, Blackwater's procedural due process rights are not triggered. The District Court's preliminary injunction order was based upon clearly erroneous legal and factual conclusions that Blackwater was likely to succeed on the merits of its procedural due process claim and therefore constituted an abuse of discretion.

Appellant City thus requests this Court reverse the District Court's June 17, 2008, preliminary injunction order and set aside the preliminary injunction issued.

Dated: July 21st, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the accompanying opening brief has been prepared using 14-point Times New Roman typeface. I further certify that the accompanying brief complies with the type-volume limitations of Rule 32(a)(7)(B). The brief is proportionately spaced, and contains 9,678 words, exclusive of the table of contents, table of authorities, signature lines, and certificates of service and compliance.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Court of Appeal Rule 28-2.6, there are no known related cases pending before the Ninth Circuit.

By: Robert J. Walters, Deputy City Attorney

Attorneys for Appellants/Defendants THE CITY OF SAN DIEGO, THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, KELLY BROUGHTON, and AFSANEH AHMADI

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2008, I directed that two copies of the foregoing "Appellants' Opening Brief," and one copy of the "Appellants' Excerpts of Record," in two volumes, and Appellants' Appendix Of State And Local Laws, Regulations, be served upon the following named counsel for Appellee, by hand, as follows:

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